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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 134

DREXEL & CO., and others,
Petitioners,

v.

GEORGE HALL and others,
Respondents.

PETITIONERS' REPLY BRIEF

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1 Chase Manhattan Plaza
New York, N. Y. 10005

New York, June 30, 1965

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No. 1160

PETITIONERS' REPLY BRIEF

Respondent's Brief is devoted in large part to possible grounds of certiorari not listed in our petition. We reiterate the ground on which we seek review. It is that under the ruling below the class action procedure is allowed to be used as a device to prolong far beyond the statutory one-year period the time in which security purchasers are required to take legal action under the Securities Act of 1933. The question is of wide-spread importance because (1) the class action device is potentially involved in the great majority of suits under the Securities Act, and (2) the class action procedure has been given such an effect by the Court below as to virtually nullify the Congressional plan of limitations, including the Congressional purpose to have uniform limitations in the Federal and State courts, which have concurrent jurisdiction over suits under the Securities Act.

I.

According to the respondents, the matter is very simple. If a class action is brought this means that the whole class is in the action and has done whatever is necessary to comply with the applicable statute of limitations.

Although this argument may have a surface glitter, it is completely divorced from the realities of Securities Act litigation. It was on the basis of these realities, rather than abstract theory, that a trial judge of great experience, Chief Judge Ryan, rejected the argument of *en masse* compliance with the one-year limitation in Securities Act § 13 and held that to allow an indefinite and unlimited right of intervention in a class action initiated by a few investors would "effect an abrogation of the statutory one-year limitation." (App. B p. 13).

What is it that really occurs when a class action is brought under the Securities Act? In the first place the so-called "class" of potential plaintiffs will seldom be a unified and "clearly identifiable" group of the kind respondents blandly describe (brief pp. 2-3). Certainly there is no such thing in the present case. The so-called class of persons having potential claims on a particular registration statement will consist of all persons who ever bought the security involved. This includes not only those who purchased at the time of the original issue and those holding the securities at the time suit is commenced, but also all the people in between who have bought and sold any of the securities. How many of these people there are, who they are, where they are located, which of them will desire to sue, and which will not desire to sue, are all facts unknown to the initiators of the so-called class action as well as to the prospective defendants.

The plaintiffs' attorney will, of course, name in the complaint only those who have actually authorized suit; as to the others he will insert some allegation phrased as broadly and generally as possible to the effect that suit is brought on behalf of everyone "similarly situated". Under these circumstances, necessarily typical of a "class suit" involving an issue of securities, the insertion of the class

suit allegation is nothing more than a kind of speculation by a plaintiffs' attorney that some others *may* join in addition to those who have actually authorized suit.

Is the commencement of a class suit under these circumstances the equivalent of *commencement of action by all members of the class?* Of course not. None of the authorities cited by respondents, and none we have ever seen, suggests that persons who are absent and unidentified, whose causes of action are independent, and who may or may not wish to sue, become parties to an action simply because some handful of investors insert in *their* complaint a boiler-plate clause invoking remedies on behalf of all.

Professor Moore has properly described a class action brought under these circumstances as "merely an invitation to joinder—an invitation to become a fellow traveller in the litigation, which may or may not be accepted." 3 *Moore's Federal Practice* p. 3443. However, as far as a statute of limitations is concerned, such a suit should be regarded as "an invitation which requires timely responses". *P. W. Husserl, Inc.* v. *Newman,* 25 FRD 264, 267 (SDNY 1960).

The commencement of such a class action not only fails to bring absent investors in as parties; it also fails to give defendants any real notice as to what claims will be made. Defendants are given no idea as to which ones and how many, out of this great mass of unknown persons, will actually sue. Thus defendants are given no real notice within the statutory period of the amount of their probable liability, and are given no opportunity to prepare evidence affecting the *individual* claims.

Respondents emphasize, as did the majority opinion below, that it is desirable to have plaintiffs in a Securities Act case join forces in one action instead of bringing numerous individual actions. This was the main thrust of

the argument of the Securities and Exchange Commission in the Court below. Such a contention is completely beside the point. There is nothing in Judge Ryan's ruling which interferes in the least with the bringing of a class action or the consolidating of individual claims in one action. However, it is unquestioned that any investors who wish to obtain the benefits of a class action must join it and assert their individual claims at some point. All that Judge Ryan required, and all that we contend for, is that persons who intend to join such an action do so within the time prescribed by Congress.

The issue involved here is not a narrow technical point. The ruling of the Court below provides a device by which the great majority of the potential plaintiffs in most Securities Act cases can have an indefinite period of time—far more than one year from the time of their discovery of the facts—during which they may sue or not as they choose. From a practical standpoint the one-year limitation of § 13 is destroyed if the ruling below is permitted to stand.

II.

Respondents contend (brief pp. 6-7) that because of a "threesome of consistent decisions of Circuit Courts of Appeals" nothing needs to be settled by this Court and in any event decision by this Court would have no utility in view of the proposed revision of Rule 23.

There is no threesome of Court of Appeals decisions on the point involved. The *Union Carbide* case, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed on consent,* 371 U. S. 801 (1962), did not involve the Securities Act at all but dealt with the four-year limitation period in the Clayton Act. Moreover, the class in that case involved a specific group of persons whose names appeared in the records of

defendants. The decision is not authority for holding that absent and completely unidentified investors in a public issue of securities can comply with the Securities Act statute of limitations through a general allegation in a complaint that a suit is brought on behalf of everyone similarly situated.

As to the *York* case, 143 F.2d 503, 529 (2d Cir. 1944) Judge Friendly (App. A pp. 9-10) pointed out its weakness as authority on the question here involved in that the decision turned on the doctrine of laches.

If the question here involved is not now settled by this Court, further controversy is clearly foreshadowed not only by the conflict in certain District Court decisions (petition pp. 18-19), but by the concurring opinion of Judge Friendly below which criticizes practically every point in the majority's decision.

The question cannot be passed off as lacking importance simply because a revision in Rule 23 has been proposed. The problems inherent in a class action being brought where a substantial portion of the so-called class is unknown and unidentified would still be presented under whatever new Rule is finally adopted. No device we can think of will avoid the basic problem in this case; *viz.* how is the statute of limitations *as a defense of substantive law* to be applied in a class action when security purchasers, previously unidentified and not parties, attempt to enter the action after the running of the limited period?

Moreover, the question decided by the Court below is of unusual importance even with a view to the cases now pending, which will need to be decided under the present rule regardless of whether an amendment is made. The Administrative Office of the Federal courts informs us that as of December 31 1964 there were pending 595 cases

in the category "Securities, Commodities and Exchanges" and we are advised by that office that most of these cases are ones under the Securities Act. Of the cases in the above category, 295 had been filed in 1964.

The possible revision of Rule 23 will also fail to solve the problem raised by the ruling below with regard to uniform limitations in the State and Federal courts, which have concurrent jurisdiction under the Securities Act. The holding that the § 13 one-year limitation can be tolled by a procedural rule inevitably means that application of the limitation will vary depending upon whether suit is brought in a State or Federal court and will vary from state to state according to local procedures. Uniformity, regarded by this Court as one of the most important purposes underlying a Congressionally created statute of limitations (*Burnett* v. *New York Central R. R.*, 33 US Law Week 4298, 4300-1), cannot be achieved if the application of the statute of limitations can be varied in accordance with the procedural rules of the particular jurisdiction. This basic and important problem will remain regardless of whether Federal Rule 23 is amended.

III.

Conclusion

The Fifth Circuit Court of Appeals, following this Court's decision in *Sibbach* v. *Wilson & Co.* 312 US 1, has reiterated that rule-making cannot modify substantive law in holding that Rule 25(a)(1) is not a statute of limitations. *Perry* v. *Allen* 239 F.2d 107, 111-2 (1956). To abridge substantive rights through Rule 25, said the Court, "is outside the mandate and inside the caveat of the Act of Congress" (28 USC § 2072).

Whatever the form of a revised Rule 23 the present problem of adjusting substantive rights to procedural forms will persist in the important context of Securities Act legislation. The present is the right occasion for resolution of the problem.

Respectfully submitted,

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